

4 April 1988
OCA 88-1041

MEMORANDUM FOR THE RECORD

SUBJECT: House Hearing on the Office of Government Ethics

1. On 31 March 1988, the Subcommittee on Human Resources of the House Committee on Post Office and Civil Service held a hearing on the reauthorization of the Office of Government Ethics (OGE). Judge Frank Q. Nebeker, Director of OGE, testified before Rep. Gerry Sikorski. Rep. Frank McCloskey appeared for a brief period. Attached are Sikorski's and Nebeker's prepared statements.

2. Sikorski asked how Nebeker views OGE's investigative mandate. Nebeker said it is to monitor compliance with Federal disclosure requirements and ethics rules of agencies. In reality, individuals assume a fact-finding role which they do not have. It is easier to implement and fund a fact-finding function if it is expressly in a statute. OGE will use inspectors general when available and if they are not placed in conflict of interest positions. Nebeker does not envision a burgeoning quasi-judicial role.

3. Sikorski then wanted to know what sort of constraints OGE is under. These are budgetary restraints. Nebeker would like to see OGE expanded, but is somewhat restrained by the Office of Management and Budget (OMB) and the Office of Personnel Management (OPM).

4. Sikorski wanted to know how OGE decides in which ethics cases to intervene. Nebeker explained that no criteria are set up. Sikorski said that former director Martin glossed over this issue when asked and said OGE had no problem deciding.

5. Nebeker said that OGE must rely on the agencies. The major sanction for misbehavior lies with an agency. Nebeker's authority is to issue corrective action. There is a difference between corrective action against an agency and against an individual. Sikorski wants language to trigger use of the inspectors general and of some sort of outside mechanism. He asked for a paper on the criteria regarding intervention.

6. With respect to whether OGE can enforce corrective action, Nebeker said it relies on persuasion. There is much cooperation from the agencies. Sikorski asked if OGE has ordered corrective action. Nebeker said no. Sikorski said 402(b)(9) needs to be clarified as to whether an order to cease or make changes has an enforcement mechanism.

7. Sikorski went on to the issue of public visibility, asking what level of such OGE and its director should maintain. That is, he wanted to know how much of a public statement would be made in an ethics case. Nebeker said the governing Executive order states that the public is to have confidence in the integrity of the Government. He has no problems with public statements of policy, agency efficiency and management. He views the condemnation of persons to be a problem of state action against individuals.

8. Sikorski then asked how to ensure that OGE follows up on ethics cases. Nebeker said OGE needs to be notified when a case is referred to the Department of Justice. He could promulgate regulations stating that OGE is notified first. Sikorski suggested doing so and also adding a notice requirement when Justice declines prosecutions and when an agency imposes administrative action. Nebeker agreed that communications should be more formally established.

9. The next topic involved monitoring and compliance. Every agency is evaluated every three to five years by OGE looking at a sampling of the agency's activities. Sikorski noted that OGE has not required agencies to keep records. He wanted to know if the data are not important. Nebeker replied that it would be nice to require this if OGE had the capacity to use it. Sikorski said that it seems OGE should know this information, especially if it only looks at agencies every three to five years. OGE needs an idea of the problems it is up against. Agencies should keep this information, even if only supplied upon request by OGE. Nebeker explained that OGE needs resources to digest the information and Sikorski agreed. Sikorski does not see how an agency can argue that its ethics program works if it does not know how many recusals it had, how many blind trusts were set up, the number of waivers granted, and so forth. He "strongly encourages" Nebeker to institute this rule. Sikorski suggested requiring that annual reports be submitted by agencies. Under 402(b)(15), OGE can issue regulations and guidelines to collect information. This should not be a burden, but a matter of filling out a form and giving it to the designated agency ethics official.

10. Nebeker does not think records of all recusals are kept, but that there are ad hoc recusals. Sikorski said these should not be ad hoc. If there is a conflict of interest or appearance of a conflict generating a recusal, it should not be ad hoc. Nebeker said that a recusal may be so obvious that it is informal when done. There are recusal agreements signed which preclude later actions.

11. Sikorski said that financial disclosure is handled with wide variations among agencies. Some have a detailed review, while others have a haphazard review. He asked if OGE should not see that agencies develop guidelines and ensure that they are followed. Nebeker agreed that it is a good idea. Sikorski then brought up the subject of Attorney General Meese's financial disclosure report and asked what OGE is doing now to ensure timely review. Nebeker said a small group within the audit section reviews annual statements. These will be handled on a special basis when necessary.

12. Sikorski asked if there was not a delay in issuing final regulations on confidential disclosures due to resource problems. Nebeker said yes. In 1983, Sikorski said, Congress gave OGE the authority to issue other regulations, but OGE has issued none. Again he asked if resources are the problem and again Nebeker said yes. Nebeker added that OGE did publish amendments to the blind trust regulations.

13. Sikorski said he knows OGE wants funds to cover authorizations for the upcoming presidential transition and the next, so that it does not have to split its focus between presidential appointments and its regular job. Nebeker would like to review the financial statements before the inauguration and said it is a matter of communicating with the transition team.

14. Sikorski asked if Congress should mandate the creation of a system to monitor post-Government employment. Nebeker said OGE already has some sort of system. He wants to wait and see how it works. Sikorski said that people are not filling out the forms and that a high percentage of people in jobs are raising questions, at least with regard to the appearance of conflicts. He said OGE needs to do a better job of monitoring in this area. Sikorski said OGE should consider issuing regulations on this subject. Nebeker said he considered not doing this. He does not know if these exceptions are defenses to crimes as a matter of fact or law. It is a conceptual morass and much thought is needed before any action is taken, perhaps by a think tank.

15. Sikorski summed up by saying that OGE has an obvious need for increased resources and maybe structural changes regarding independence. Nebeker has already requested an increase, but has not heard from either OPM or OMB. He wants to have 35 OGE personnel in 1989 and add 18 more in 1990. He will supply the figures regarding the budgetary increase.

16. As [] of the Office of General Counsel has asked this office to monitor any actions resulting from this hearing, I am alerting [] who handles the miscellaneous authorizations/appropriations account, to this request.

[]
Legislation Division
Office of Congressional Affairs

Attachments

OCA/LEG [] (4 April 1988)

Distribution:

Original - OCA/Leg/Subject File: Miscellaneous Personnel
1 - OCA/Leg/Subject File: Misc. Auth./Appropriations
1 - D/OCA
1 - DNL/OCA
1 - []
1 - []
1 - OCA Registry
1 - RH Signer
1 - OCA Read